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American Jewish Congress

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THE MEANING OF THE ESTABLISHMENT CLAUSE

A DEBATE

(Editor's Note: The participants in this discussion are Dr. Leo Pfeffer, Associate General Counsel of the American Jewish Congress, and Prof. James M. O'Neill, the prominent author and lecturer. In the interest of a defined controversy, Drs. Pfeffer and O'Neill have agreed upon the following resolution: Resolved, that the First Amendment, interpreted in the light of its history, forbids non-preferential governmental assistance to religion.)

NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION*

LEO PFEFFER

At the outbreak of the Revolutionary War it was illegal to celebrate the mass in public in any of the American colonies other than Pennsylvania.¹ In Virginia a Christian who denied the Trinity was punishable with imprisonment for three years and could be adjudged an unfit custodian of his own children.² Baptists were frequently whipped, beaten, arrested, fined and imprisoned, sometimes on bread and water.³ James Madison, complaining to a friend about "that diabolical, hell-conceived persecution [that] rages," wrote in 1774 that "there are at this time five or six well-meaning men in close jail for publishing their statements, which in the main are very orthodox," but varied somewhat from the accepted doctrines of the established Anglican Church.⁴ In one Massachusetts town alone, eighteen dissenters were in jail for refusing to pay ministerial rates in support of the established worship.⁵

In Philadelphia the Continental Congress began its operations by adopting a resolution calling for prayer at the opening of each daily session, and designating an Episcopalian clergyman to act as its chaplain. The proclamations and other state papers of the Congress were not only replete with references to religion, but unabashedly expressed adherence to Protestantism. The Congress continually invoked as sanction for its acts, the name of "God," "Almighty God," "Nature's God," "God of Armies," "Lord of Hosts," "His Goodness," "God's Superintending Providence," "Great Governor of the World," "Jesus Christ," "Holy Ghost,"

* This article is based in large part on a chapter in Dr. Pfeffer's forthcoming book, *Church, State and Freedom*, to be published by Beacon Press.

1. GREENE, RELIGION AND THE STATE 58.

2. JEFFERSON, *Notes on Virginia*, in BLAU, CORNERSTONE OF RELIGIOUS FREEDOM 77-78.

3. HUMPHREY, NATIONALISM AND RELIGION IN AMERICA 368-369.

4. 1 THE WRITINGS OF JAMES MADISON 18-21 (Hunt ed. 1904).

5. MECKLIN, STORY OF AMERICAN DISSENT 202.

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"Free Protestant Colonies," and many other similar expressions of devout Protestantism. The legislative acts of the Congress manifested the same acceptance of a union between the government and the Protestant religion. The Congress did not hesitate to legislate upon such subjects as morality, sin, repentance, humiliation, divine service, fasting, prayer, reformation, mourning, public worship, funerals, chaplains, true religion and thanksgiving.⁶

Barely a dozen years later, Virginia defeated a bill which would have required all to contribute to the support of some religion or, in lieu thereof, to education, and instead enacted a measure which sought forever to secure the "natural right" that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever." The Constitutional Convention of 1787 met for four months without the recitation of a prayer. After the Convention had been in session for a month, the octogenarian Franklin, who in earlier years had been a Deist, moved "that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service." The motion was received politely though not without embarrassment. According to the records of the Convention, "after several unsuccessful attempts for silently postponing the matter by adjourning, the adjournment was at length carried, without any vote on the motion."⁸ And the last substantive words of the Constitution promulgated by the Convention were the mandate that "no religious test shall ever be required as a qualification to any office or public trust under the United States."⁹

This change in the conception of the relationship of religion to government was so rapid that it can fairly be called revolutionary. In Virginia, the revolution culminated in 1786 with the enactment of Jefferson's Statute for Establishing Religious Freedom. In some states it took longer; Massachusetts retained a vestige of establishment until 1832. But by 1791, when the majestic words of the First Amendment—"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"—were added to the Constitution, the outcome and meaning of the revolution were clear. The intent of that amendment, therefore, must be interpreted not only in the light

6. HUMPHREY, *op. cit. supra* n. 3 at 407-427.

7. BLAU, *op. cit. supra* n. 2 at 74.

8. 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 450-452; MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 259-261 (Scott ed.)

9. U. S. CONST. Art. VI.

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of that revolution but with the realization that it represented the formalization of the culmination of that revolution, and was not merely a preliminary or intermediate step therein.

The product of the revolution was an experiment, unique in the history of civilization. This experiment rested upon the principle—implicit in the Constitution of 1787 and explicit in the Amendment of 1791—that government has no power to legislate in the domain of religion, either by restricting its free exercise or providing for its support. The launching of the American experiment cannot be attributed to any single event or cause. Practical considerations were undoubtedly of vital significance. These included the enactment in 1689 of the English Act of Toleration which conferred freedom of worship upon dissenting Protestants and which influenced colonial policy in America,¹⁰ the rise of commerce,¹¹ the exigencies of the Revolutionary War requiring co-operation of dissenters and Catholics,¹² and, above all, the large variety of religious sects which settled along the Atlantic seacoast.¹³ Voltaire recognized that: "If there were one religion in England, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and happiness."¹⁴ To this Madison added: "Security for civil rights must be the same as that for religious rights; it consists in the one case in a multiplicity of interests and in the other in a multiplicity of sects."¹⁵

Important as these practical considerations were, it would be a complete misreading of American history if they were to be considered the sole reason for the American experiment of separation of religion and government. Ideological considerations were equally important. The American experiment rests as much on the social contract as it does upon the mutual suspicions and rivalries of Anglicans, Congregationalists and Presbyterians.

Insistence upon the ideological basis of separation is not merely a matter of academic history; it has real consequence to our present discussion. If separation is accepted as the necessary

10. MECKLIN, *op. cit. supra* n. 5 at 51.

11. See request made in London by the lords of trade to the president of the council which began: "With regard to the affair of Mr. Davies, a Presbyterian, as Toleration and a free exercise of religion is so valuable a branch of true liberty and so essential to the enriching and improving of a Trading Nation, it should ever be held sacred in his Majesty's Colonies . . ." SWEET, RELIGION IN COLONIAL AMERICA 332.

12. GREENE, *op. cit. supra* n. 1 at 76; 1 STOKES, CHURCH AND STATE IN THE UNITED STATES 459-461.

13. GREENE, *op. cit. supra* n. 1 at 64-65; 1 STOKES, *op. cit. supra* n. 12 at 288; BETH, CHURCH AND STATE IN AMERICAN POLITICAL THEORY 145 (unpublished doctoral dissertation, at University of Chicago Library).

14. Quoted in SWEET, *op. cit. supra* n. 11 at 338.

15. *Id.* at 339.

price paid for religious pluralism,¹⁶ it follows that governmental support of religion is permissible and even desirable if it can be accomplished in a manner which is fair to all sects.¹⁷ On the other hand, if separation is conceived as the lack of power on the part of government to intervene in religious affairs, support of religion is violative of the principle of separation even if all sects agree upon the manner of sharing the state's favors.

This, I submit, is the conceptual foundation of the relationship between church and state instinct in the Constitution and the First Amendment—the inherent incapacity of political government to concern itself with religious matters. With the exception of a relatively small minority who vainly sought to preserve their particular moribund establishment, the generation which adopted the Constitution and the Amendment was committed to the proposition that excluded from the powers delegated to the political state was any power over religion. The elevation of this proposition into a constitutional principle which, until recently, has been held almost sacred by the American people, was the result principally of two disparate and almost antagonistic forces which vied for the mind and soul of the new republic—a deeply religious, evangelical and pietest force led by such devout Christians as Jonathan Edwards and George Whitefield, and a skeptical, anti-clerical force led by Jefferson and Tom Paine.¹⁸

These religionists and the rationalists were both motivated by an uncompromising enmity to establishment, Anglican or Congregationalist; but their ideological meeting place was the principle that religion was beyond the delegated jurisdiction of political society. They arrived at this meeting place from different directions. To the religionists, the source of all temporal power was Christ and he had seen fit not to delegate power over religion to temporal governments. To them, the relationship of state and church was governed by the text: "Render unto Caesar the things which are Caesar's and unto God the things that are God's." To the rationalists, the source of temporal power was the "people in nature" and they had not seen fit to delegate power over religion

16. See, *e. g.*, OSGINACH, *THE CHRISTIAN STATE*, quoted in 3 STOKES, *supra* n. 12 at 464: "Separation of Church and State is to be tolerated as a lesser evil and because of necessity owing to the multiplicity of sects and constitutional provisions."

17. See, *e. g.*, Statement of Catholic Bishops, *N. Y. Times*, Nov. 21, 1948, p. 63: "It would be an utter distortion of American history and law to make that practical policy involve the indifference to religion and the exclusion of cooperation between religion and government implied in the term 'separation of Church and State' as it has become the shibboleth of doctrinaire secularism."

18. MECKLIN, *op. cit. supra* n. 5 at 36: "It was the pressure of circumstances that brought the leaders of the dissenting sects into sympathetic contacts with Paine and Jefferson. When the battle for religious and national liberty was finally won and the great principle of separation of church and state was safely embodied in the Constitution, Paine and Jefferson speedily lost their attraction for the dissenting sects."

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to the governments instituted among men. Their text was the social contract.

Defense of separation has recently been so often equated with defense of irreligion, that it is pertinent to cite but a few expressions of the separation principle by deeply religious persons who were leaders and founders of their churches in America. First in point of time was, of course, Roger Williams who as much as anyone else founded the Baptist Church in America. To Williams, "States . . . are proved essentially civil," and the "power of true discerning the true fear of God" was not one of the powers delegated to civil authority."¹⁹

All lawful Magistrates in the World, [said Williams] both before the coming of Christ Jesus, and since, (excepting those unparalleled typical Magistrates of the Church of Israel) are but Derivatives and Agents immediately derived and employed as eyes and hands, serving for the good of the whole: Hence they have and can have no more Power, than fundamentally lies in the Bodies or Fountains themselves, which Power, Might, or Authority, is not Religious, Christian, etc. but natural, humane and civil.²⁰

To the argument that religion needs the aid of government, Williams answered summarily that ". . . the Scriptures of Truth and the Records of Time concur in this, that the first Churches of Christ Jesus, the lights, patterns and precedents to all succeeding Ages, were gathered and governed without the aid, assistance, or countenance of any Civil Authority . . ."²¹

The Baptists who followed Williams remained faithful to his tradition. Samuel Stillman, pastor of the First Baptist Church in Boston, delivered a sermon in 1779 in which he presented the Baptist view that the "jurisdiction of the magistrate neither can nor ought to be extended to the salvation of souls."²² In 1791, John Leland, Baptist leader in Virginia, wrote a tract entitled *Rights of Conscience and therefore Religious Opinions not cognizable by law*, in which he stated that "government has no more to do with religious opinions of men than it has with the principles of mathematics."²³

Isaac Backus, representing the Massachusetts Baptists, argued for the elimination of taxation for religious purposes on the ground that "The free exercises of private judgment, and the inalienable rights of conscience are too high a rank and dignity to be submitted to the decrees of councils or the imperfect laws of

19. BLAU, *op. cit. supra* n. 2 at 43.

20. *Id.* at 48.

21. *Id.* at 46.

22. HUMPHREY, *op. cit. supra* n. 3 at 119.

23. MECKLIN, *op. cit. supra* n. 5 at 297.

fallible legislators . . . religion is a concern between God and the soul with which no human authority can intermeddle . . .²⁴ Later, he defended the provision in the Federal Constitution prohibiting religious tests on the ground that “. . . nothing is more evident, both in reason and the Holy Scriptures, than that religion is ever a matter between God and individuals, and therefore no man can impose any religious prerogatives of the Lord Jesus Christ.”²⁵

Though the Baptists were most active and articulate, they were far from alone among the religionists in preaching and teaching that religion was beyond jurisdiction of the state. It was the Presbytery of Hanover which remonstrated against the Virginia Assessment Bill on the ground that:

The end of Civil government is security to the temporal liberty and property of Mankind; and to protect them in the free Exercise of Religion—Legislators are invested with powers from their constituents, for these purposes only; and their duty extends no farther—Religion is altogether personal, and the right of exercising unalienable; and it is not, cannot, and ought not to be, resigned to the will of the society at large; and much less to the Legislature—which derives its authority wholly from the consent of the people; and is limited to the Original intention of Civil Associations . . .²⁶

The reference to the social contract in this remonstrance manifested its wide acceptance in the last quarter of the 18th century, so widespread, indeed, that it was a “self-evident truth” to the signers of the Declaration of Independence. This fact and the influence of Locke are also indicated by the memorial presented by the Baptists to the Continental Congress in 1774:

Men unite in society, according to the great Mr. Locke, with an intention in every one the better to preserve himself, his liberty and property. The power of the society, or Legislature constituted by them, can never be supposed to extend any further than the common good, but is obliged to secure to every one's property. To give laws, to receive obedience, to compel with the sword, belong to none but the civil magistrate; and on this ground we affirm that the magistrate's power extends not to the establishing any articles of faith or forms of worship, by force of laws; for laws are of no force without penalties. The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but pure and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God.²⁷

24. HUMPHREY, *op. cit. supra* n. 3 at 331.

25. *Id.* at 466.

26. AMERICAN STATE PAPERS ON FREEDOM IN RELIGION 110.

27. HUMPHREY, *op. cit. supra* n. 3 at 332.

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The concept that religion was outside the ken of political society, so warmly espoused by the religionists other than the continually decreasing minority committed to a particular establishment, was of course at least equally acceptable to the rationalists, Deists, Unitarians and other non-orthodox. Many of the political leaders of the Revolutionary and post-Revolutionary period had come under the influence of Deism and not a few were apathetic if not antagonistic to formal religious worship and institutionalized religion.²⁸ It is significant that the first four presidents of the United States were either Deists or Unitarians. But liberalism in religion was not limited to the leaders; rationalism and skepticism had made substantial progress among the urban masses. Paine's *Age of Reason* was one of the most widely read books of the period,²⁹ and not more than one out of eight Americans and probably as few as one out of every twenty-five was affiliated with any church.³⁰

It is not too much to say that whatever evidence exists supports the view that when the Constitutional Convention convened in Philadelphia in 1787 the overwhelming majority of Americans accepted the proposition that religion was a personal, non-political matter and concurred with Paine's statement in *Common Sense* that:

As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof; and I know of no other business which government hath to do therewith.³¹

It is, therefore, not surprising that whereas almost every document or promulgation issued by the Continental Congress invoked or referred to God³² or Christ,³³ the Constitution emerging from the Philadelphia convention contained no invocation nor a single reference to religion other than the negative one in the ban on religious tests for federal office. Neither the omission nor the negative reference was inadvertent and neither remained unnoticed. A delegate to the Connecticut ratifying convention urged inclusion of "an explicit acknowledgment of the being of God, his

28. 1 BEARD, *RISE OF AMERICAN CIVILIZATION* 449.

29. LASKI, *AMERICAN DEMOCRACY* 257.

30. GARRISON, *History of Anti-Catholicism in America*, SOCIAL ACTION, Jan. 15, 1948, p. 9; MOEHLMAN, *In Defense of McCollum v. Board of Education*, 38 A. B. A. J. 345 (1952). Today at least one out of every two Americans is affiliated with a church. U. S. DEPARTMENT OF COMMERCE, CENSUS OF RELIGIOUS BODIES 18 (1936); YEARBOOK OF AMERICAN CHURCHES 239 (1951).

31. 1 WRITINGS OF PAINE 108 (Conway ed.).

32. The short Declaration of Independence contains four references to God.

33. The treaty of peace with Great Britain was proclaimed "In the name of the most Holy and Undivided Trinity." HUMPHREY, *op. cit. supra* n. 3 at 430.

perfections and his providence."³⁴ At a meeting of Congregationalists in June, 1788, a request was presented "that some suitable Testimony might be borne against the sinful omission in the late Federal Constitution in not looking to God for direction, and of omitting the mention of God in the Constitution."³⁵ And two Presbyterian church groups resolved not to vote at elections until the Constitution would be amended to acknowledge the sovereignty of God and Christ.³⁶

The ban on religious tests likewise aroused opposition among some religionists. When the issue was raised in the Maryland legislature, Luther Martin related:

The part of the system which provides that no religious test shall ever be required as a qualification to any office or public trust under the United States was adopted by a great majority of the Convention and without much debate: however, there were some members so unfashionable as to think that a belief in the existence of a Deity, and of a state of future rewards and punishments would be some security for the good conduct of our rulers, and that, in a Christian Country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism.³⁷

There appears to have been no doubt as to the reasons for the ban. In a number of states, the fear was expressed "that the constitution by prohibiting religious tests, opened a door for Jews, Turks and infidels,"³⁸ and it was urged that if it were felt inadvisable to require of public officers a belief in Protestantism or Christianity, at least inquiry should be made if the nominee "believes in a Supreme Being and in a future state of rewards and punishments."³⁹ Almost invariably the basic reason given for the omission was the same. In Connecticut, Oliver Ellsworth, later Chief Justice of the Supreme Court, agreed that "If any test-act were to be made, perhaps the least exceptionable would be one requiring all persons appointed to office to declare at the time of their admission, their belief in the being of God, and in the divine authority of the Scriptures." But, Ellsworth replied, "the business of civil government is to protect the citizen in his rights, to defend the community from hostile powers, and to promote the general welfare. Civil government has no business to meddle with the private opinion of the people."⁴⁰

34. *Id.* at 462.

35. *Id.* at 463.

36. SCHAFF, CHURCH AND STATE IN THE UNITED STATES 433..

37. 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 227.

38. 5 THE WRITINGS OF JAMES MADISON 176 (Hunt ed. 1904).

39. 4 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 195-198.

40. HUMPHREY, *op. cit. supra* n. 3 at 463-464.

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In Massachusetts, the Baptist Backus defended the prohibition on the ground that "nothing is more evident, both in reason and the Holy Scriptures, that religion is ever a matter between God and individuals."⁴¹ Even a fellow delegate who was a minister in the established Congregational Church agreed with the ban on the ground that "God alone is the God of conscience, and, consequently, attempts to erect human tribunals for the conscience of men, are improper encroachments upon the prerogatives of God."⁴²

In North Carolina, it was argued that while it was possible that the people may "choose representatives who have no religion at all . . . how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for . . . It would be happy for mankind if religion was permitted to take its own course, and maintain itself by the excellence of its own doctrines. The divine Author of our religion never wished for its support by worldly authority . . . It made greater progress for itself than when supported by the greatest authority upon earth."⁴³ To this Governor Johnston added that "it would have been dangerous if Congress could intermeddle with the subject of religion."⁴⁴

These expressions manifested a widespread if not universal assumption that the new national government had no power to intermeddle with religion in any way, either to hinder it or to support it. As Madison forcefully put it, the Constitution was not to create "a shadow of right in the general government to intermeddle with religion."⁴⁵ Edmund Randolph, addressing the Virginia ratification convention, declared that "no power is expressly given to Congress over religion."⁴⁶ Pinckney of South Carolina had suggested making the absence of power specific and explicit; he had proposed a provision in the Constitution that ". . . the Legislature of the United States shall pass no law on the subject of religion; nor touching or abridging the liberty of the press; nor shall the privilege of the writ of Habeas Corpus ever be suspended, except in the case of rebellion or invasion."⁴⁷

While none of these express prohibitions was acted upon by the Convention, there appears little reason to doubt that the reason was not disagreement with their purpose but a strong

41. 2 ELLIOTT, DEBATES 118-119.

42. *Id.* at 148-149.

43. *Op. cit. supra* n. 39 at 195-198.

44. *Id.* at 200.

45. *Id.* at 122; 5 ELLIOTT, DEBATES 132.

46. *Op. cit. supra* n. 37 at 310.

47. *Id.* at 122; 5 ELLIOTT, DEBATES 131.

belief that they were unnecessary. A provision forbidding Congress from establishing religion or prohibiting its free exercise was unnecessary because, as Madison said, "The government has no jurisdiction over" religion.⁴⁸ James Wilson argued that "all is reserved in a general government which is not given," and that since the power to legislate on religion or the press was not given to the federal government, the government did not possess it and there was therefore no need for an express prohibition. "What part of this system," he queried, "put it in the power of Congress to attack . . . the rights of conscience? When there is no power to attack, it is idle to prepare the means of defense."⁴⁹

Hamilton went further; he argued that a bill of rights not only was unnecessary but was dangerous as it might create the inference that a power to deal with the reserved subject was in fact conferred. Writing in the *Federalist* he said:

I go further and affirm that bills of rights in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on the very account, would afford a colorable pretext to claim more than was granted. For why declare that things shall not be done which there is no power to do?⁵⁰

The people were not satisfied with these assurances. In the ratifying convention of almost every state some objection was expressed to the absence of a restriction upon the Federal government with respect to legislation regarding religion.⁵¹ Jefferson felt that a bill of rights should not "rest on inferences," and it was only because Madison and the other proponents promised to work for a bill of rights after adoption of the Constitution that a sufficient number of states were persuaded to ratify it. Accordingly, shortly after his election to the House of Representatives in 1789, Madison introduced his compilation of proposals for amendments to the Constitution to meet the demands for a bill of rights.

The debates in the House of Representatives on Madison's proposal respecting religious freedom and the various other proposals on the same subject have been the subject of considerable discussion. It is largely upon these that the contention that the First Amendment bars only preferential aid to religion is based. I have elsewhere set forth the reasons for my belief that these

48. *Op. cit. supra* n. 38 at 176.

49. 3 ELLIOTT, DEBATES 252.

50. FEDERALIST PAPERS 559 (Modern Library ed.).

51. Kohler, *The Fathers of the Republic and Constitutional Establishment of Religious Liberty*, in LUZZATTI, GOD IN FREEDOM, 692-693.

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debates and proposals do not sustain the contention,⁵² and it is not necessary to repeat them. Here it need only be stated that nothing in the debates surrounding the proposals which finally culminated in the religion clause of the First Amendment indicates any intent to abridge a recognized power inherent or previously conferred and certainly not to confer a power previously absent. As we have seen, it was a widespread belief in 1791, both among religionists and rationalists, that no political state had the rightful power to deal with religion on a preferential or non-preferential basis. It was universally assumed that the federal government, whose jurisdiction was doubly derivative, had no such power. It was also generally assumed that the purpose of the First Amendment was to express the absence of that power.⁵³ To meet the danger warned against by Hamilton, the Ninth⁵⁴ and Tenth⁵⁵ Amendments were added to the Bill of Rights. It would indeed be an ironic if not cruel joke upon the people if notwithstanding all these precautions Congress were held to have more power under the First Amendment than it would have had without it.

Two abortive attempts were made—whether intentionally or not cannot be said—to create the “colorable pretext to claim more than was granted” which Hamilton feared. When the First Amendment, as adopted in the House, was debated in the Senate, the following proceedings took place:

The resolve of the House of Representatives . . . was read, as followeth:

“Art. III. Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.”

. . .

The Senate resumed the consideration of the resolve of the House of Representatives on the amendments to the Constitution of the United States.

. . .

52. *Church and State: Something Less than Separation*, 19 CHI. L. REV. 1 (1951).

53. See Bancroft's letter to Schaff:

“Congress from the beginning was as much without the power to make a law respecting the establishment of religion as it is now that the amendment was passed.” SCHAFF, *op. cit. supra* n. 35 at 137. See also, BEARD, *THE REPUBLIC* 166, 170: “The Constitution does not confer upon the Federal government any power to deal with religion in any form or manner . . . The First Amendment merely confirms the intention of the framers.”

54. “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”

55. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

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On motion to amend Article the third, and to strike out these words: "Religion, or prohibiting the free exercise thereof," and insert "No religious sect or society in preference to others:"

It passed in the negative.

On motion for reconsideration:

It passed in the affirmative.

On motion that Article the third be stricken out:

It passed in the negative.

On motion to adopt the following, in lieu of the third Article: "Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society:"

It passed in the negative.

On motion to amend the third Article, to read thus: "Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed:"

It passed in the negative.

On the question upon the third Article as it came from the House of Representatives:

It passed in the negative.

On motion to adopt the third Article proposed in the resolve of the House of Representatives, amended by striking out these words, "Nor shall the rights of conscience be infringed:"

It passed in the affirmative.⁵⁶

It can be seen that the purpose of the proposed changes was to have the First Amendment read: Congress shall make no law establishing one Religious Sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

And: Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

If either of these two versions had been adopted, an arguable contention could be made that by prohibiting only preferential establishment, non-preferential aid or support was impliedly permitted. However, both versions were rejected and the prohibition which came out of the joint conference committee and became the First Amendment was in fact broader in its language than the version originally adopted by the House; instead of forbidding

56. JOURNAL OF PROCEEDINGS OF THE FIRST SESSION OF THE UNITED STATES SENATE, 63, 67 (Aug. 25, and Sept. 3, 1791).

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only a "law establishing religion," it forbade any law "respecting an establishment of religion."

This language carried with it a prohibition almost unlimited in scope. It was, in substance, Pinckney's proposed ban on any law "on the subject of religion," or Charles Livermore's proposed First Amendment—approved at one time in the House—"Congress shall make no law touching religion . . ."⁵⁷ For the term "establishment of religion" was not used—at least not solely—in the sense of an "establishing of religion" or in the sense of an "established" church as we generally understand the term, but in the sense of a "religious establishment," in the same sense that a religious law may be called a law of religion or a religious book may be called a book of religion.

True enough, the Supreme Court in 1899 denied that the Amendment's phrase "law respecting an establishment of religion" was synonymous with "law respecting a religious establishment."⁵⁸ But Roger Sherman, in presenting the usual explanation for the omission of a Bill of Rights, argued that it was unnecessary because "Congress had no authority delegated to them by the Constitution to make religious establishments."⁵⁹ And Madison, who more than any other single person was responsible for the First Amendment, not only considered the terms synonymous but on two separate occasions forgetfully quoted the Amendment as using the term "religious establishment." In vetoing, as President, a bill to incorporate the Episcopal Church in the District of Columbia, he said:

(T)he bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States which declares that "Congress shall make no law respecting a religious establishment . . ."⁶⁰ This particular church, therefore, would so far be a *religious establishment by law*, a legal force and sanction being given to certain articles of its Constitution and administration.⁶¹

A week later he vetoed a bill giving certain land to a Baptist church because

. . . the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a

57. 1 ANNALS OF CONGRESS 731. Of this proposal Stokes says: "And so the general form which the religious-freedom guarantee later took in our Federal Bill of Rights was largely due to Samuel Livermore." 1 STOKES, *op. cit. supra* n. 12 at 317.

58. *Bradfield v. Roberts*, 175 U. S. 291 (1899).

59. 1 ANNALS 732.

60. The quotations marks are Madison's.

61. 1 RICHARDSON, MESSAGES OF THE PRESIDENTS, 489. (Italics added.) Note that unconstitutionality was not predicated on the ground that the bill was preferential.

principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies,⁶² contrary to the article in the Constitution which declares that "Congress shall make no law respecting a religious establishment" . . .⁶³

Moreover, the word "establishment" had a broad meaning, comprehending almost every tangible manifestation of religion—or at least organized or institutionalized religion. An incorporated church was a "religious establishment," in Madison's veto message. A place where persons worshipped was a "religious establishment."⁶⁴ Jefferson considered even a non-sectarian Presidential proclamation of thanksgiving a law respecting an establishment of religion interdicted by the First Amendment.⁶⁵ Madison considered the institutions of Congressional chaplains⁶⁶ and military chaplains⁶⁷ as religious establishments.

These instances of the use of the term "establishment" give strong support for the proposition that the general purpose and understanding of the First Amendment at the time of its adoption was that it expressed the federal government's inherent incapacity to act at all in the field of religion. Of course, in view of the complexity of human institutions, endeavors and motivations, complete government non-cognizance of religion is impossible practically; but as far as is possible and practical, the mandate of the First Amendment required the government to be religion-blind.⁶⁸ The Amendment represented in the eyes of the generation that adopted it the formalization and legal expression of the uniquely American concept, which, although expressed in different ways, had by 1791 almost achieved the status of a truism—the concept that religion was a private matter, a matter which

62. (Italics added.) Note the use of the plural, and again the avoidance of grounding unconstitutionality on preference.

63. 1 RICHARDSON, *op. cit. supra* n. 61 at 490. The quotation marks are Madison's.

64. A proposed regulation of the University of Virginia in 1824 provided that the students "will be free and expected to attend religious worship at the establishment of their respected sects." BUTTS, *AMERICAN TRADITION IN RELIGION AND EDUCATION*, 123.

65. 11 JEFFERSON'S WRITINGS (Monticello ed.) 428-430. Jackson shared this view. 3 STOKES, *op. cit. supra* n. 12 at 181-183.

66. Fleet, *Madison's "Detached Memoranda,"* 3 WILLIAM AND MARY QUARTERLY (1946) p. 559: "The establishment of the chaplainship [to Congress] is a palpable violation of equal rights, as well as of Constitutional principles . . . Were the establishment to be tried by its fruits, are not the daily devotions . . . already degenerating into a scanty attendance and a tiresome formality? . . ."

67. *Ibid.*: "Better also to disarm in the same way, the precedent of Chaplainships for the army and navy, than erect them into a political authority in matters of religion: The object of this establishment is seducing; the motive to it is laudable."

68. During the disestablishment period in which the Constitution and First Amendment were adopted, many states enacted Constitutional or statutory provisions barring clergymen from political or at least legislative office. Madison opposed the exclusions on the ground, among others, that it violated the principle "which exempts religion from the cognizance of Civil power." 5 MADISON 288 (Hunt ed.).

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lies solely between man and his God, a matter not within the scope or cognizance of political society, etc. To paraphrase Madison: Since religion is wholly exempt from the cognizance of civil society, it could not be within the authority of any legislative body whose jurisdiction is both derivative and limited,⁶⁹ and therefore even less could it be within the authority of the Federal government whose jurisdiction was itself derived from limited legislative bodies.

This was the meaning of the First Amendment as understood by the generation which adopted it, and, with one notable exception shortly to be mentioned, it was practically the universal acceptance of its meaning until the recent efforts to restrict its meaning to bar only preferential establishments. A century after the Amendment was adopted, Lord Bryce testified to the universality of this interpretation:

It is accepted as an axiom by all Americans that civil power ought to be not only neutral and impartial as between different forms of faith, but ought to leave these matters entirely on one side, regarding them no more than it regards the artistic or literary pursuits of the citizens. *There seem to be no two opinions on this subject in the United States.*⁷⁰

Obviously, under this interpretation of the Amendment Congress can no more support all sects than it can single out one or more sects for preferential support.

The incident of the Blaine amendment bears a strong support for this interpretation. In 1876 Senator Blaine introduced a resolution for a constitutional amendment providing:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination *nor shall any money so raised or lands so devoted be divided between religious sects or denominations.*⁷¹

This proposal received a majority in both houses but just fell short of the necessary two-thirds vote in the Senate.

It will be noted, first that the proposed amendment expressly prohibited non-preferential support; and second, that its application was limited to the states. It is difficult to believe that a more

69. MEMORIAL AND REMONSTRANCE AGAINST VIRGINIA ASSESSMENT BILL, first two paragraphs after introductory paragraph.

70. 2 THE AMERICAN COMMONWEALTH, 776 (3rd ed. 1894). (Italics added.)

71. 4 CONG. REC. 5580 (44th Cong., 1876). (Italics added.)

severe restriction would be imposed upon the states than governed action by the federal government. The sponsors of the Blaine amendment did not so construe it. Senator Christancy, arguing for the amendment, stated that "it is simply imposing on the States *what the Constitution already imposes on the United States.*" Equally significant is Senator Frelinghuysen's statement that "the article as amended by the Senate prohibits the States, for the first time, from the establishment of religion, from prohibiting its free exercise, and from making any religious test a qualification to office."⁷² It thus appears clear that not only was it believed that the First Amendment barred non-preferential aid to religion, but also that such aid constituted an "establishment of religion."

Until 1948, when the appellees in *McCullum v. Board of Education*⁷³ unsuccessfully called upon the Supreme Court to reject this broad interpretation of the establishment clause, the only significant dissent was by Justice Story. Story, though a Unitarian, firmly believed in state support of the Christian religion. In Massachusetts he had fought to substitute the exclusive Congregationalist establishment with a constitutional provision providing for the support of all Christian denominations.⁷⁴ Unsuccessful there in his attempt to stay the onward course of the American history of church-state relations, he sought to undo disestablishment in Virginia by his interpretation of its constitution that:

Consistently with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under stipulated form of discipline or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, *or by establishing funds for the support of ministers, for public charities, for the endowment of churches, for the sepulture of the dead.*⁷⁵

This Canutian misreading of Virginia's constitution and its victorious struggle for separation proved equally futile for the simple reason that the Virginia courts refused to accept it.⁷⁶ Undaunted, Story tried the same approach to the Federal Constitution:

72. 4 CONG. REC. 5245, 5561 (1876). (Italics added.)

73. 333 U. S. 302 (1948).

74. MEYER, CHURCH AND STATE IN MASSACHUSETTS 195 ff.

75. *Terrett v. Tyler*, 6 Cranch 43, 49 (U. S. 1815). (Italics added.)

76. HOWE, CASES ON CHURCH AND STATE IN THE UNITED STATES 16.

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The real object [he wrote] of the [First] Amendment was not to countenance, much less to advance, Mohametanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.⁷⁷

For more than a century it appeared that Story was no more successful in his war against complete separation in the federal government than in Massachusetts and Virginia. Now, however, his narrow construction of the First Amendment has suddenly experienced a new revival. True, some compromise had to be made with the liberalism of our day. It is conceded now—Story to the contrary notwithstanding—that Judaism is entitled to support from the government along with Christianity. But this concession vitiates the entire force of Story as authority. For Story was firm in his conviction that the Constitution sanctions preferential treatment of Christianity over other religions, and if Story was in error to that extent he may have been equally in error in implying that the sole purpose of the First Amendment was to prevent a “national ecclesiastical establishment.”

Perhaps if our Constitution and the First Amendment had been framed by the Continental Congress in 1775 it would have reflected a relationship of church and state comprehending state support of religion. But, for good or ill, our Constitution was framed at the conclusion rather than the beginning of the revolution in church-state relations, and that revolution was reflected in the principle implicit in the Constitution and explicit in the First Amendment that religion, preferential or non-preferential, is completely outside the jurisdiction of the government.

77. COMMENTARIES ON THE CONSTITUTION § 1874 (5th ed. 1891).